FILE COPY

FILED
MAR 12 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 587

IN THE MATTER OF
DIVERSEY HOTEL CORPORATION,
AN ILLINOIS CORPORATION,
DEBTOR.

ABRAHAM KOSDON, SAM HAUSLINGER AND
BENJAMIN LAPINE,
Petitioners,

vs.

DIVERSEY HOTEL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY.

MEYER ABRAMS,
134 N. La Salle St.,
Chicago, Illinois,
and
WILLIAM H. RUBIN,
100 N. La Salle St.,
Chicago, Illinois,
Attorneys for Petitioners.

SHULMAN, SHULMAN & ABRAMS,
134 N. La Salle St.,
Chicago, Illinois,
Of Counsel.

March 10, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 587

IN THE MATTER OF

DIVERSEY HOTEL CORPORATION,

AN ILLINOIS CORPORATION,

DEBTOR.

ABRAHAM KOSDON, SAM HAUSLINGER AND BENJAMIN LAPINE,

Petitioners,

vs.

DIVERSEY HOTEL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY.

FACTS MISSTATED.

Respondent's statement (p. 3) that "all bondholders in the case, except the appellants, joined in the prayer of the petition" is not only a misstatement, but is based on a misconception of the Act. Bondholders may *not* join in a

voluntary petition by a debtor and their voluntary appearance in support of a petition cannot even be considered, as the act only authorizes a contest on the part of a creditor and their support is of no importance. Instead of "all" bondholders only $88,000 in bonds out of $1,387,500 came to the aid of the debtor.

The statement (p. 4) that the Illinois corporation was organized in 1938 for the purpose of superseding the Delaware corporation and that the former agreed to carry out the terms of the provisions of the trust deed and to pay the $1,387,500 in bonds should be considered in the light that the Illinois corporation was organized without the consent of the bondholders who were the beneficiaries of the stock and without their knowledge or approval, and that the Illinois corporation while organized in 1938, *did not assume the debt* of the bond issue until August 22, 1946 (R. 86) shortly prior to the maturity of the bond issue. It is not true as stated that the stock was issued to George W. Pearson as Chairman of the committee but was issued by the Illinois corporation *to three strangers:* Messrs. Barton, Fink and Hayes, (R. 85) who subsequently transferred their certificates, and new stock was issued in the name of Pearson, *individually,* after he had terminated his relationship as chairman of the committee (R. 67).

The statement of the respondent (p. 8) that the answer of the petitioners "admitted the insolvency of the debtor" is also inaccurate. The debtor alleged that it was *not* insolvent in the bankruptcy sense and insolvent in the sense that it was unable to pay the bonds at maturity (R. 6: ¶ 8) and the answer (R. 14: ¶ 8) denied that it was solvent and asserted that it was *insolvent in the bankruptcy sense.*

THE DECISION DIRECTLY CONFLICTS WITH THE VIEWS OF THIS COURT AS INTERPRETED BY OTHER CIRCUIT COURTS OF APPEALS.

The contention of the respondents that the decision in the instant case, which approved the petition as filed in good faith although contested at the *outset,* when it appeared that the value of its assets was less than the first mortgage indebtedness and that there are no other intervening creditors or stockholders, is not in conflict with the views of this court in the *Marine Harbor* case (317 U. S. 78) and *Fidelity Assurance Society,* (318 U. S. 608) is completely without merit. While the *Marine Harbor* case directly involved the construction of Section 146 (4) which is based on the pendency of a prior proceeding, it also laid down the rule of law with reference to Section 146 (3) which is not based on the pendency of a prior proceeding, and in the *Fidelity* case in the first part of its decision the court exclusively discussed Section 146 (3) which is not based on the pendency of any prior proceeding and squarely held that where the mortgage debt exceeds the value of the property and there are no rights to be adjusted among stockholders and creditors such a proceeding is not filed in good faith. After discussing this branch of the case this court said (p. 618):

> "It is urged that a plan of liquidation may constitute a reorganization under Chapter X, and decisions are cited to that point, but an examination of them will demonstrate that in none save where the corporate purpose of the debtor was, in effect, holding and liquidating securities was the plan such as is proposed here. Under the facts of this case, the suggested plan is but an alternative for ordinary bankruptcy, without any

readjustment of the rights of creditors and stockholders *inter se*, and this fact serves to distinguish the remaining cases on which reliance is placed.

"We conclude that, in this aspect, good faith, in the statutory sense, is lacking, since no such reorganization as the statute was intended to accomplish is reasonably to be expected."

In citing this case and in relying thereon in construing Section 146(3) *in re: Unity Life Ins. Co.*, 47 F. Supp. 355, 360, the court pointed out that the words "good faith" in the act do not connote "bona fide" but the term is a "technical one" and no matter how good the intentions of the parties may be, if it appears that a plan of reorganization cannot be expected and that liquidation is the ultimate result, the petition must be dismissed under Section 146(3) no matter how beneficial it may be. The decision was affirmed by the Fourth Circuit (136 F. (2) 133) which also cited the decision of this court on this point.

Even the Seventh Circuit so construed this part of the decision of this court in considering the first phase of the case in *Sheridan View Bldg. Corp.*, 149 F. (2) 532 and it concluded, independently of the point that there was a prior proceeding pending, that the proceeding was not initiated in good faith when it appeared from the outset that the mortgage indebtedness exceeded the value of the property.

While we are also of the opinion that the distinction between challenging at the outset of the proceedings and challenging at the conclusion of the proceedings is not a real distinction and that the various courts have misconstrued the meaning of the word "outset" in the opinion of this court, as it appears from the result of the decision *in re V. Loewer's Gambrinus Brewing Co.*, 141 F. (2) 747 where after sustaining the good faith because it was not challenged at the outset, the District Court was thereafter compelled to dismiss it when it appeared from the plan that

liquidation and not reorganization was the only possible result (58 F. Supp. 520), here, the good faith was challenged at the *outset* of the proceedings so that even that distinction is absent here.

In each of the cases that we cited in our Brief the various circuit courts distinguished the decisions of this court on the only point that in the two cases where this court decided that the petition was not filed in good faith the petition was assailed at the *outset*, while in the other cases it was assailed in connection with the reorganization plan. They are *unanimous* that where the petition is assailed at its outset and it develops that no rights of creditors or stockholders are to be adjusted and that the property is valued less than the first mortgage bond issue, that in such a case the petition is not filed in good faith under Section 146 (3).

Respondents are aware that in the decision of the Ninth Circuit in *San Francisco Laundry Association* v. *American Trust Company*, 142 F. (2) 187 there was no prior pending proceeding in the State Court and that the court squarely held that where the mortgage debt exceeds the value of the property that the petition must be dismissed under Section 146 (3). They seek to distinguish that case on the ground that there the court based its decision on the fact that the debtor was *insolvent in the bankruptcy sense* and here they say it is only insolvent in that it was unable to meet the bond issue at maturity. They overlooked the fact that when this issue was contested by the answer under Section 137 they were required under the two decisions of this court to meet this issue and to sustain their allegations by proof. Not only did they fail to meet this burden but the proof shows that *the corporation is insolvent in the bankruptcy sense* as shown in the Brief in support of the petition (pp. 17-18).

In view of the conflict of the decision in the instant case with the views of this court as construed by the other

circuit courts of appeals, it follows that the Writ of Certiorari should be granted. We will, therefore, not discuss the other points which were fully discussed in our Brief.

Respectfully submi‘ted,

MEYER ABRAMS,
WILLIAM HENNING RUBIN,
Attorneys for Petitioners.